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No. 97-104

In the Supreme Court of the United States

OCTOBER TERM, 1996

KATIA GUTIERREZ DE MARTINEZ, ET AL., PETITIONERS

v.

DIRK A. LAMAGNO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held that the district court did not abuse its discretion in denying petitioners' request for discovery and an evidentiary hearing on whether a federal employee was acting within the scope of his employment, as certified by the Attorney General pursuant to 28 U.S.C. 2679(d)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-49b) is reported at 111 F.3d 1148. The opinion of the district court (Pet. App. 1a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1997. The petition for a writ of certiorari was filed on July 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, who are citizens of the Republic of Colombia, were involved in an automobile accident in Barranquilla, Colombia with respondent Dirk A. Lamagno, a Special Agent employed by the Drug

Enforcement Administration (DEA). At the time of the incident, Lamagno was driving a government-owned Ford Bronco and was accompanied by a female passenger. Pet. App. 1a-3a.

Petitioners filed an administrative claim with the DEA as required by Section 709 of the Controlled Substances Act. See 21 U.S.C. 904 (as amended by the Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 13, 93 Stat. 1048). The DEA referred the claim to the Department of Justice, which has not yet made an administrative determination on that claim. Pet. App. 3a.

Petitioners also filed this action in the United States District Court for the Eastern District of Virginia based on diversity of citizenship. The United States Attorney certified on behalf of the Attorney General that Lamagno was acting within the scope of his office or employment under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, and moved to substitute the United States as the defendant. See 28 U.S.C. 2679(d)(1).[1] The district court substituted the United States in place of Lamagno, whom it dismissed from the action. The district court further granted the United States' motion to dismiss the suit on the ground that the United States has retained its sovereign immunity

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[1] The Westfall Act provides immunity to federal employees for torts committed while acting within the scope of their employment by requiring that the United States be substituted as the defendant and that the suit proceed under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* See 28 U.S.C. 2679(b)(1).

for suits based on claims arising in a foreign country. See 28 U.S.C. 2680(k). On appeal, the court of appeals concluded that the Attorney General's certification was not judicially reviewable and affirmed the district court's order substituting the United States as a defendant and dismissing the action. Pet. App. 7b-8b.

2. This Court reversed the court of appeals' decision and held that the Attorney General's scope of employment certification under 28 U.S.C. 2679(d)(1) is judicially reviewable. *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 434 (1995). On remand, the United States Attorney, on behalf of the Attorney General, recertified that Lamagno was acting within the scope of his employment, and the government again moved to substitute and to dismiss under 28 U.S.C. 2680(k). Pet. App. 1a, 5a-6a.

Over the government's opposition, petitioners sought limited discovery and an evidentiary hearing to determine the propriety of the Attorney General's certification. Based upon the parties' submissions of briefs, affidavits, and documentary evidence on the issue of Lamagno's scope of employment, the district court held that "the material facts relating to the scope of employment issue are not in dispute and that additional discovery would not develop any additional facts." Pet. App. 8a. The court explained that "[t]here is no factual dispute necessitating limited discovery," because petitioners "have failed to allege any specific facts or information that discovery will yield that is relevant." *Id.* at 8a-9a. Accordingly, the court found that it "may review the certification based on the evidence already before it." *Id.* at 9a.

Turning to the evidence presented in support of the government's certification, the district court considered the affidavits of Lamagno and DEA agent Julia

Bermann. Lamagno averred that, at the time of the accident, he was driving a female DEA employee to a hotel following an official dinner at a nearby restaurant, that he did so pursuant to a DEA policy requiring the escort of female agents at night, and that he became lost while driving to the hotel. Pet. App. 10a-11a. Bermann's affidavit confirmed that she was the female passenger in Lamagno's car and corroborated other aspects of Lamagno's affidavit. *Id.* at 11a, 13a; see also *id.* at 39b, 42b-43b.

The district court concluded that Lamagno was acting within the scope of his employment. Pet. App. 11a-13a. It specifically rejected petitioners' "speculation" that Lamagno was intoxicated at the time of the accident. *Id.* at 11a. The court observed that, although Lamagno admitted that he had consumed some alcohol on that night, "there is no evidence that any person investigating the accident suspected that the defendant was intoxicated," and "[d]eclarations submitted on behalf of the defendant state[d] [that] he was never observed under the influence of alcohol." *Id.* at 12a. "Based on the evidence before it," the district court concluded "that there is insufficient evidence on which to set aside the United States Attorney's certification." *Id.* at 13a. Accordingly, the court substituted the United States for Lamagno and dismissed the action against the United States under 28 U.S.C. 2680(k). Pet. App. 13a-14a.[2]

3. The court of appeals affirmed. Pet. App. 1b-49b. The court found that the district court did not abuse

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[2] Petitioner does not challenge the district court's conclusion that if Lamagno was acting within the scope of his employment, the action was properly dismissed under 28 U.S.C. 2680(k).

its discretion in denying petitioners' request for discovery and an evidentiary hearing. *Id.* at 29b-32b. The court reasoned that petitioner did "not point * * * to any specific evidence that could be uncovered by further discovery beyond the speculative possibility" that depositions of Lamagno and Bermann would "expos[e] possible inconsistencies in their stories." *Id.* at 29b. Applying a *de novo* standard of review (*id.* at 13b, 50b-51b), the court also concluded that the district court properly found that Lamagno was acting within the scope of his employment at the time of the accident. *Id.* at 33b-48b.[3]

ARGUMENT

The court of appeals correctly held that the district court did not abuse its discretion in denying petitioners' request for discovery and an evidentiary hearing on the propriety of the Attorney General's scope of employment certification. Petitioners presented no evidence to contradict the affidavits and documents that provided the basis for the certification. Petitioners were not entitled to discovery merely to question the affiants in the hope of securing answers that would contradict their sworn statements. See Pet. App. 8a-9a, 29b-32b. Further review by this Court is not warranted.

1. This Court held in *Gutierrez de Martinez* v. *Lamagno* that scope of employment certifications are subject to judicial review. See 515 U.S. at 422-423 & n.3 (citing cases). That decision left undisturbed the

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[3] Like the district court, the court of appeals applied Virginia law to determine when an employee acts within the scope of employment. Pet. App. 9a-10a; *id.* at 33b-48b. Petitioner does not challenge the court of appeals' application of Virginia law to this case.

standards developed by the courts of appeals for conducting such review.

Under those standards, a district court makes a *de novo* inquiry to determine whether a federal employee acted within the scope of employment at the time of the incident giving rise to the claim. Courts have held that the certification is *prima facie* evidence that the employee's challenged conduct was within the scope of employment. See, *e.g.*, *Kimbro* v. *Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994), cert. denied, 515 U.S. 1145 (1995); *Brown* v. *Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991); *S.J. & W. Ranch, Inc.* v. *Lehtinen*, 913 F.2d 1538, 1543 (1990), modified, 924 F.2d 1555 (11th Cir.), cert. denied, 502 U.S. 813 (1991). "If the matter is disputed, the burden then shifts to the plaintiff, who must come forward with specific facts rebutting the certification." *Schrob* v. *Catterson*, 967 F.2d 929, 935 (3d Cir. 1992); see also *Kimbro*, 30 F.3d at 1509; *Brown*, 949 F.2d at 1012; *Hamrick* v. *Franklin*, 931 F.2d 1209, 1211 (7th Cir.), cert. denied, 502 U.S. 869 (1991); *S.J. & W. Ranch, Inc.*, 913 F.2d at 1543. In the event that the plaintiff offers such evidence, the district court must make an independent determination that the federal employee was acting within the scope of his employment. See, *e.g.*, *Anthony* v. *Runyon*, 76 F.2d 210, 213 (8th Cir. 1996); *Kimbro*, 30 F.3d at 1509.

Contrary to petitioners' contention (Pet. 15-18), the decision below does not conflict with the decisions of the courts of appeals holding that limited discovery and an evidentiary hearing are required when there is a disputed issue of material fact on the question whether the federal employee was acting within the scope of his employment. See, *e.g.*, *Kimbro*, 30 F.3d at 1508 (reading 28 U.S.C. 2679(d)(3) "as a directive that,

where necessary, the court conduct an evidentiary hearing to determine the scope of employment issue"); accord *Melo* v. *Hafer*, 13 F.3d 736, 747 (3d Cir. 1994).[4] Indeed, the decision below recognizes that discovery may be warranted if a plaintiff submits "specific evidence or the forecast of specific evidence that contradicts the Attorney General's certification." See Pet. App. 27b-28b. Because petitioners in this case have not created a disputed issue of material fact, the court of appeals correctly held that the district court did not abuse its discretion in denying petitioners' request for discovery and an evidentiary hearing. *Id.* at 29b-32b. That holding is consistent with the decisions of other courts of appeals. See, *e.g.*, *Anthony*, 76 F.3d at 214 ("Although we have indicated that it may be necessary for the court to conduct an evidentiary hearing to resolve the scope-of-employment issue, a hearing is not required in every case.") (citation omitted); *Melo*, 13 F.3d at 742 ("If the facts can be determined without an evidentiary hearing, the court can rule on a pretrial motion to substitute or to set aside the substitution based on the certification, pleadings, documentary evidence, and affidavits.") (quoting *Schrob*, 967 F.2d at 936); *Forrest City Machine Works, Inc.* v. *United States*, 953 F.2d 1086, 1088 (8th Cir. 1992) (holding that district court did not err in denying plaintiffs' request for discovery when plaintiffs "have not come forward with any evidence contradicting the

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[4] The other case petitioners cite (Pet. 16), *Wang* v. *United States*, 947 F.2d 1400, 1402 (9th Cir. 1991), is inapposite. That decision held that the district court's exclusion of plaintiffs from an evidentiary hearing on the scope of employment issue was prejudicial error.

government's scope-of-employment certification and supporting exhibits").

2. Petitioners also assert (Pet. 21-22) that there are disputed issues of material fact on whether Lamagno was acting within the scope of his employment at the time of the accident. That fact-bound contention, however, does not warrant this Court's review. In any event, both courts below correctly held that petitioners had failed to demonstrate any factual disputes material to the scope-of-employment determination. Pet. App. 8a-9a; *id.* at 29b-32b. The courts carefully considered the evidence presented by the government that, on the night of the accident, Lamagno was driving a female DEA agent to her hotel following an official dinner, that he was driving her pursuant to an official DEA policy that female agents be escorted at night, and that he was not intoxicated at the time of the accident. *Id.* at 9a, 11a-13a, 38b-43b.

Although petitioners asserted that Lamagno was not acting within the scope of his employment as defined by DEA policy at the time of the accident, they did not offer any specific evidence to contradict respondents' evidence and therefore failed to establish a material issue of fact that warranted either discovery or an evidentiary hearing. See Pet. App. 29b (noting that petitioners "do not point * * * to any specific evidence that could be uncovered by further discovery beyond the speculative possibility of inconsistency"). The court of appeals properly concluded that, "[b]ecause every factual issue pressed by [petitioners] is adequately addressed in Lamagno's supporting affidavits, the district court rightly reviewed the certification without allowing discovery or conducting an evidentiary hearing." *Id.* at 32b.

Accordingly, the court of appeals correctly ruled that Lamagno was acting within the scope of his employment when the accident occurred and that the district court properly granted the motion to substitute the United States.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioners also suggest (Pet. 20) that the courts below treated the scope-of-employment certification as "conclusive." Both courts expressly rejected that notion, however, and conducted a *de novo* review of the Attorney General's certification. See Pet. App. 6a; *id.* at 21b-23b & n.5.